

Parliament and the Courts: A Contemporary Assessment of the Ethic of Mutual Respect

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The core responsibilities of the legislative and judicial branches of government are well defined and easily recognised. But there are some areas in which responsibilities might be thought to overlap, or even be contestable. The boundaries of responsibility have traditionally been maintained by an ethic of mutual respect. This paper assesses the extent to which that ethic continues to adequately regulate relationships between the two branches of government and to inform the propriety of conduct at or near the boundaries between the relative responsibilities of each branch by examining:

- the impact of court proceedings upon the proceedings of parliament and vice versa;
- the adjudication and punishment of contempt of parliament;
- the extent of the parliaments' power to control judicial officers, and the extent of the courts' power to control parliamentary officers; and
- the interpretation and invalidation of legislation by the courts, and the parliaments' power to legislatively control the courts.

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The Separation of Powers

Systems of government based upon those developed at Westminster are relative latecomers to the notion of the separation of powers. It is true that the writings of Baron de Montesquieu significantly influenced structures of government developed in the 18th and 19th centuries in many countries, including notably the United States of America and France. However, it was not until the 20th century that the separation of powers became entrenched in Australia through the structure adopted for the Constitution of the Commonwealth, and the courts of England and Wales were not formally separated from the legislative and executive branches of government until this century. Ironically, it was a misunderstanding of the system of government that existed in 18th century England that had inspired Montesquieu's advocacy of the separation of powers.

Perhaps the relative novelty of institutional, as opposed to a theoretical, separation of powers, coupled with the continuing practice of vesting responsibility for the executive branch of government in members of the legislature has contributed to a degree of popular cynicism with respect to its reality and efficacy. Take for example the following recent exchange, from the televised satirical mock interview series, between Messrs Clarke and Dawe:

Clarke: The separation of powers is the vital constitutional distinction between the Parliament, the executive and the judiciary.

- Dawe: And they're all completely separate?
- Clarke: No, they're not. But it's a lovely idea isn't it?
- Dawe: Terrific idea.
- Clarke: Beautiful, beautiful idea.
- Dawe: Does it work?
- Clarke: No. Not in the estimation of the Parliament and the executive ... that's the trouble. That's what we're working through.²

The tri-partite structure of government gives rise to three bi-partite relationships. This article is only concerned with the relationship between the legislative and judicial branches of government. Even then, any attempt to comprehensively assess or analyse that relationship would require a work of much greater dimensions than those which have been allotted to this paper. Rather, this article will only address one particular aspect of the relationship, being the extent to which the ethic of mutual respect between the legislative and judicial branches of government continues to regulate the ongoing relationship between those branches of government and to inform the propriety of conduct at or near the boundaries between the relative responsibilities of each branch.

² John Clarke & Brian Dawe, 'The new sliding scale of ethics. Officially launched this week' (broadcast 18 June 2015) available: www.abc.net.au/news/2015-06-18/clarke-and-dawe--the-new-sliding-scale-of-ethics/6556308

Mutual respect

The basic responsibilities of the legislative and judicial branches of government can be easily described and recognised. The core function of the legislative branch is to enact laws and the core function of the judicial branch is to enforce those laws and the common law of Australia. However, there are a number of areas of government activity in which the responsibilities of each branch might be thought to overlap, or even to be contestable. In those areas, there are legal structures which define the boundaries of responsibility of each of the two branches of government with which this article is concerned. In Australia those legal structures are to be found in written constitutions, augmented by the common law. By tradition, the practical operation of those structures has been facilitated by the respect which each of the legislative and judicial branches has shown for the responsibilities and actions of the other, and the mutual desire to avoid situations in which one branch might be thought to be trespassing upon, or even usurping the legitimate responsibilities of the other. As Chief Justice French observed:

The relationship between the courts and the Parliament is defined by Commonwealth and State Constitutions and the common law. To work that relationship also requires the respect of each for the limits of its own function and the proper functions of the other. It requires courtesy and civil discourse between the institutions. These are necessary aspects of any working relationship however tightly defined by law.³

³ Chief Justice Robert French AC, Paper presented at the Queensland Supreme Court Seminar, Brisbane, 4 August 2012, and also published as 'The Courts and Parliament' (2013) 87 *Australian Law Journal* 820 (at 830).

This article will assess the extent to which this ethic of mutual respect continues to effectively regulate relationships between the legislative and judicial branches of government, using four areas of intersection between the work of the two branches as the canvas upon which the assessment will be painted. Those four areas are:

- (a) the impact of court proceedings upon the proceedings of Parliament and vice versa;
- (b) the adjudication and punishment of contempt of Parliament;
- (c) the extent of the Parliaments' power to control judicial officers, and the extent of the courts' power to control parliamentary officers; and
- (d) the interpretation and invalidation of legislation by the courts, and the Parliaments' power to legislatively control the courts.

Magna Carta

Before turning to those specific areas of intersection, however, as this year is the 800th anniversary of the execution of the first version of *Magna Carta* (Great Charter) at Runnymede outside London on 19 June 1215, it would be churlish not to make some mention of the impact which that document has had upon the relationship between the judicial branch and the other branches of government, notwithstanding that in 1215 there was no legislature, the legislative and executive functions of government were united in the King, and the King appointed judicial officers at his pleasure. I approach this topic with

some trepidation, however, because as Lord Jonathan Sumption observed earlier this year, so much has been written and said about *Magna Carta* that it is impossible to say anything new about it that is not mad—and even if one says something mad about it, it is quite likely to have been said before, even quite recently.⁴

As the Hon James Spigelman AC has pointed out, a proper appreciation of the significance of *Magna Carta* requires the Charter to be viewed in the context of the previous attempts to contain the feudal powers of the King by invoking historical constraints upon the exercise of those powers said to be drawn from the time of the Saxon Kings. It must also appreciate the use to which the Charter was put several hundred years later, particularly by Lord Coke for much the same purpose — namely, an attempt to constrain the absolute power of the monarchy.⁵

William I, known in English history as William the Conqueror but in French history as Guillaume le Bâtard, promised on his coronation in 1066 to restore the laws of Edward the Confessor, delegitimising the rule of his own predecessor, Harold. William's son, Henry I, executed a Charter upon his coronation in 1100, in which he, like his father, promised to restore the law of Edward the Confessor except to the extent that the law had been properly amended by William I, with the

⁴ Lord Sumption, Supreme Court of the United Kingdom, 'Magna Carta Then and Now' (Address to the Friends of the British Library, 9 March 2015) 1.

⁵ James Spigelman, 'Magna Carta in its Medieval Context' (Banco Court, Supreme Court of New South Wales, 22 April 2015) 21.

advice of the Council of Barons. This delegitimised the laws passed by Henry's immediate predecessor, his older brother, William Rufus. Similarly, when Henry I's grandson, Henry II, was crowned, he acknowledged 'the concessions and grants and liberties and free customs' which had been acknowledged by his grandfather, thereby delegitimising the actions of his predecessor, Stephen. However, neither of Henry II's sons, Richard I or King John, formally acknowledged the concessions made by their father or great-grandfather.⁶ As Spigelman commented, 'political promises are like that' and the fact that Henry I's promises were not kept 'did not detract from the creation of a myth of a golden past'.⁷

It was in that context that, in 1215, the rebellious Barons who had taken control of London required King John to acknowledge the various constraints upon his feudal powers listed in the first version of the Great Charter as the price for their continuing support for his rule. At the risk of gross over-simplification, the general thrust of the Charter was to require the King to acknowledge that he was subject to the law and custom of the land and could not act upon whim or caprice.

Almost 400 years later, after his appointment as Chief Justice of the Court of Common Pleas in 1606, Sir Edward Coke placed great reliance on the Charter for a number of purposes, none of which

⁶ Note 5, 3-6.

⁷ Note 5, 5, 6.

would have been contemplated by its authors (said to have included the Archbishop of Canterbury) or its signatories. One of those purposes was the assertion of the dominance of the common law courts over the various other courts and tribunals then competing for jurisdiction, including most particularly the ecclesiastical courts. That dominance was achieved by the issue of prerogative writs by the common law courts in order to control proceedings in the other courts and tribunals. The source of the power to issue those writs was said by Coke to lie in *Magna Carta*, and the guarantees of due process which he asserted were to be found within its terms.⁸

Coke also denied the power of the King to sit as the ultimate judge or to construe the statutes, and he asserted that only judges could decide legal cases. Moreover, as the precursor to the great battle for supremacy between the King and the Parliament which followed, Coke boldly asserted the institutional autonomy of the judicial branch from the monarch. Indeed, Coke went even further in *Bonham's case*:⁹

in many Cases, the Common Law doth controll Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will controll it, and adjudge such Act to be void.

⁸ James Spigelman, 'Lions in Conflict: Ellesmere, Bacon and Coke – The Prerogative Battles' (The Second Patron's Address, Academy of Law, Sydney, 4 October 2013).

⁹ [1572] Eng R 106; [1610] 8 Co Rep 107(a); 77 ER 638.

In *Kable's case*,¹⁰ Justice Dawson suggested that such views did not survive the revolution of 1688, or at least did not survive for very long after the revolution, as a result of 'the complete acceptance by the courts that an Act of Parliament is binding upon them and cannot be questioned by reference to principles of a more fundamental kind'.¹¹ However, since those observations were made, perhaps encouraged by the invalidation of statutes in countries in which the legislature's powers are constrained by a written constitution, and the subordinacy of domestic legislation to the treaties to which the United Kingdom acceded in return for membership of the European Union, a more recent decision from that country suggests that the views expressed by Coke in *Bonham's case* can no longer be regarded as heretical.¹² I return to this issue later, but first examine some of the more conventional areas in which responsibilities of the courts and the legislature might be thought to overlap, or even be contestable.

1. The impact of court proceedings upon the proceedings of Parliament and vice versa

The cordiality of the relationships between Parliament and the courts is sometimes tested when statements are made or events take place in the course of parliamentary proceedings which are relevant to proceedings before the court. In such circumstances, at least two issues potentially arise. First, can evidence be given in court of statements made or documents produced during parliamentary

¹⁰ [1996] HCA 24; (1996) 189 CLR 51.

¹¹ *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24 [13]; (1996) 189 CLR 51, 73-74.

¹² *Jackson v Attorney General* [2005] UKHL 56, [102].

proceedings (the exclusionary principle)? Second, to what extent should parliamentary proceedings be modified or curtailed because of possible prejudice to pending court proceedings (the *sub judice* rule)?

The first question concerns the ambit of action appropriately taken by a court, and the second question concerns the ambit of action appropriately taken by participants in parliamentary proceedings.

The Exclusionary Principle

Following the Parliament's victory over the monarch in the great constitutional struggles which took place during the 17th century in England, freedom of speech within the course of parliamentary proceedings was enshrined in Article 9 of the *Bill of Rights 1689*, which provides:

That the freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament.¹³

All Australian parliaments have equivalent provisions.¹⁴

Consistently with the ethic of mutual respect to which I have referred, courts have consistently given a wide interpretation to these

¹³ *I Will & Mar*, Sess 2, ch 2 (spelling and capitalisation modernised).

¹⁴ Commonwealth of Australia Constitution s 49; *Parliamentary Privileges Act 1987* (Cth) s 16(1); *Imperial Acts Application Act 1969* (NSW) s 6, sch 2; *Parliament of Queensland Act 2001* (Qld) s 8; *Imperial Acts Application Act 1984* (Qld) s 5, sch 1; *Constitution Act 1934* (SA) s 38; *Constitution Act 1975* (Vic) s 19; *Imperial Acts Application Act 1980* (Vic) ss 2, 8, sch; *Parliamentary Privileges Act 1891* (WA) s 1; *Australian Capital Territory (Self Government) Act 1988* (Cth) s 24; *Legislative Assembly (Powers and Privileges) Act* (NT) s 6(1); *R v Turnbull* (1958) Tas SR 80, 84—see Australian Law Reform Commission, *Copyright and the Digital Economy* (13 February 2014) [15.33], note 41; Enid Campbell, *Parliamentary Privilege* (2003) 10.

provisions. The freedom conferred is absolute and is not defeated by malice or fraud. The freedom applies to causes of action arising from events taking place outside parliamentary proceedings, as well as to causes of action arising from events which took place within parliamentary proceedings. The protection applies to members and officers of the Parliament, and also to non-members participating in parliamentary proceedings. The protection extends to any attempt to use statements or events which occurred in the course of parliamentary proceedings for a purpose adverse to any participant in those proceedings, whether directly or indirectly and through whatever means. As the Privy Council observed:

parties to a litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggestion (whether by direct evidence, cross-examination, inference or submission) that action or words were inspired by improper motive or were untrue or misleading.¹⁵

The protection applies to civil proceedings¹⁶ and to criminal proceedings brought against members or former members of Parliament.¹⁷

The breadth of the ambit of the operation of these provisions recognised by the courts has resulted in its protection being described as 'the single most important parliamentary privilege'.¹⁸ The breadth of the protection provided by provisions modelled on Article 9 of the Bill

¹⁵ *Prebble v Television New Zealand Ltd* (1995) 1 AC 321, 337.

¹⁶ *Amann Aviation Pty Ltd v Commonwealth* (1988) 81 ALR 710.

¹⁷ *R v Turnbull* (1958) Tas SR 80; *R v Jackson* (1987) 8 NSWLR 116; *R v Theophanous* [2003] VSCA 78.

¹⁸ Joint Committee on Parliamentary Privilege (UK), *First Report* (30 March 1999) [36] cited in Enid Campbell, *Parliamentary Privilege* (2003) 10.

of Rights has arguably been expanded even further by the Commonwealth Parliament as a result of its enactment of s 16(3) of the *Parliamentary Privileges Act 1987* (Cth). That subsection provides:

- (3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:
 - (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
 - (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
 - (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

As noted by Professor Enid Campbell,¹⁹ in *Prebble v Television New Zealand*, the Privy Council expressed the view that the provision is declaratory of the effects of Article 9 of the *Bills of Rights 1689*.²⁰ A similar view has been taken in other cases.²¹ However, read literally, par (c) of the provision goes rather further than the previously decided cases by prohibiting the drawing of inferences or conclusions irrespective of whether or not they were adverse to the Parliament or any of its members or participants in its proceedings. By contrast, the conventional view of Article 9 has always been that the purpose for which the evidence of parliamentary proceedings is adduced is critical

¹⁹ Enid Campbell, *Parliamentary Privilege* (2003) 93.

²⁰ *Prebble v Television New Zealand Ltd* (1995) 1 AC 321, 333.

²¹ *Amann Aviation Pty Ltd v Commonwealth* (1988) 81 ALR 710, 718; *Lawrence v Katter* (1996) 141 ALR 447, 481; *Rann v Olsen* (2000) 76 SASR 450 [228] - [229].

to the operation of the provision. If the evidence is adduced for a purpose which is adverse to the Parliament or any participant in the proceedings before the Parliament, the Article or its contemporary equivalents prevent the evidence being led.²² The importance of an adverse purpose to the application of the exclusionary principle explains why evidence of parliamentary debates and explanatory memoranda relating to legislation is routinely provided to courts, without objection, when issues arise with respect to the proper construction of legislation. As was observed in *Theophanous*, 'the scope and validity of s 16(3) of the Act have yet to be determined by the High Court'.²³

Professor Campbell has also pointed out that the cases dealing with the precise ambit and application of Article 9 of the *Bill of Rights* and the provisions modelled on it are not entirely consistent.²⁴ Because the criterion of exclusion is the imprecise notion of purpose, some variation of outcome in individual cases is inevitable. What is, however, indubitably clear is that the courts have consistently given a very broad interpretation and ambit of operation to these provisions, consistently with the ethic of mutual respect to which I have referred.

²² *Church of Scientology of California v Johnson-Smith* (1972) 1 QB 522.

²³ *R v Theophanous* [2003] VSCA 78, [67].

²⁴ Note 19, 90-92.

The *Sub Judice* Rule

The *sub judice* rule is a convention or practice according to which members choose not to speak about current court cases during parliamentary debates.²⁵ As a convention or rule of practice, it is quite different in character to the rule which I have described as the exclusionary principle, which is a rule of law. It is, however, commonly embodied in Standing Orders, such as the following order of the New Zealand House of Representatives:

Matters awaiting or under adjudication in, or suppressed by an order of, any New Zealand court may not be referred to in any motion, debate, or question, including a supplementary question, subject always to the discretion of the Speaker and to the right of the House to legislate on any matter or to consider delegated legislation.²⁶

The rationale for the convention has been explained by the Joint Committee on Parliamentary Privilege of the United Kingdom:

It is important that a debate, a committee hearing, or any other parliamentary proceeding should not prejudice a fair trial, especially a criminal trial. But it is not only a question of prejudicing a fair trial. Parliament is in a particularly authoritative position and its proceedings attract much publicity. The proper relationship between Parliament and the courts requires that the courts should be left to get on with their work. No

²⁵ Its origins lie in the House of Commons between 1844 and 1963 when 'a convention, or self-denying ordinance' developed whereby matters that were awaiting adjudication in a court of law would not be referred to in the Commons (Paul Carmichael and Brice Dickson, *The House of Lords: Its Parliamentary and Judicial Roles* (1999) 92).

²⁶ House of Representatives, Standing Orders of the House of Representatives (as amended 30 July 2014), Order 115. In determining whether to exercise the discretion to allow for a member to speak on a *sub judice* matter the Speaker must:

- (a) [balance] the privilege of freedom of speech against the public interest in maintaining confidence in the judicial resolution of disputes, and
- (b) [take] into account the constitutional relationship of mutual respect that exists between the legislative and judicial branches of government, and the risk of prejudicing a matter awaiting or under adjudication in any New Zealand court, including one awaiting sentencing.

matter how great the pressure at times from interest groups or constituents, Parliament should not permit itself to appear as an alternative forum for canvassing the rights and wrongs of issues being considered by the judicial arm of the state on evidence yet to be presented and tested. Although the risk of actual prejudice is greater in a jury trial, it would not be right to remove appeal cases or other cases tried without a jury from the operation of the rule. Restrictions on media comment are limited to not prejudicing the trial, but Parliament needs to be especially careful: it is important constitutionally, and essential for public confidence, that the judiciary should be seen to be independent of political pressures. Thus, restrictions on parliamentary debate should sometimes exceed those on media comment.²⁷

Similar views have been expressed elsewhere.²⁸ The ethic of mutual respect which underpins the *sub judice* rule was noted by Lord Neuberger, then Master of the Rolls:

The House of Parliament's *sub judice* rules are an example of the way in which Parliament and the courts are concerned to ensure that each refrains from trespassing on the other's province. Their proper application ensures that the rule of law is not undermined and that a citizen's right to fair trial is not compromised.²⁹

A stark example of the potential for prejudice to legal proceedings as a result of statements made in Parliament, and the media commentary which very often follows such statements, has been provided by Professor Anthony Bradley QC, who referred to a case:

... in 1990, when towards the end of the trial of three Irishmen suspected of conspiring to murder the Secretary of State for Northern Ireland (Tom

²⁷ Joint Committee on Parliamentary Privilege (UK), *First Report* (30 March 1999) [192].

²⁸ Legislative Assembly of Ontario, 'No. 80: Votes and Proceedings' (27 October 2008, Sessional Day 88) cited in Lorne Sossin and Valerie Crystal, 'A Comment on "No Comment": The Sub Judice Rule and the Accountability of Public Officials in the 21st Century' (2013) 36(2) *Dalhousie Law Journal* 535, 552.

²⁹ Committee on Super-Injunctions, *Report of the Committee on Super-Injunctions, Super-Injunctions, Anonymised Injunctions and Open Justice* (2011) vi.

King MP), at which the accused had all remained silent, the Home Secretary announced in the House that the Government intended to change the law on the right to silence; this was followed at once in the media by prominent statements from the Northern Ireland Secretary and (in his retirement) Lord Denning, declaring that far too many guilty men were acquitted because of the right to silence.

The jury convicted the three accused, and McCann was sentenced to 25 years; but the convictions of the three accused were set aside because of these comments on the proposed change in the law.³⁰

Notwithstanding the general acceptance of the *sub judice* rule as a rule of practice supported only by Standing Orders, there is nothing which a court can do to prevent contravention of the convention, or to impose any sanction for parliamentary commentary which might prejudice the fairness of a trial or lead to a trial being aborted. This was expressly acknowledged in the course of inquiries concerned with the impact which 'super injunctions' might have upon parliamentary proceedings.³¹ In that context, a committee chaired by Lord Neuberger observed:

Article 9 of the Bill of Rights 1689 recognises and enshrines a longstanding privilege of Parliament: freedom of speech and debate. It is an absolute privilege and is of the highest constitutional importance.

Any attempt by the courts to go beyond that constitutional boundary would be unconstitutional. No super-injunction, or any other court order, could conceivably restrict or prohibit Parliamentary debate or proceedings.³²

³⁰ Professor Anthony Bradley QC, Written evidence (13 December 2011) reproduced in: Joint Committee on Privacy and Injunctions – Oral and written evidence (2012) 55. The case was *R v McCann* (1990) 92 Cr App Rep 239.

³¹ Super injunctions are injunctions which suppress disclosure or publication of the existence of the order suppressing disclosure or publication.

³² Committee on Super-Injunctions, *Report of the Committee on Super-Injunctions, Anonymised Injunctions and Open Justice* (2011) vii.

So, the preservation of the fairness of court proceedings from the adverse consequences of inappropriate parliamentary commentary depends upon the maintenance of the ethic of mutual respect.

2. The adjudication and punishment of contempt of Parliament

The doctrine of the separation of powers implicit in the structure of the Constitution of the Commonwealth of Australia has led to it repeatedly being held that the determination and punishment of criminal guilt is an exclusively judicial function which can only be performed by courts established in accordance with the requirements of Chapter III of the Constitution.³³ However, there is an exception to this principle. That exception comes about because s 49 of the Constitution provides:

The powers, privileges, and immunities of the Senate and the House of Representatives, and of the members and committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

One of the long-established privileges of the House of Commons is the privilege of determining whether a contempt of the House has been committed, and the corresponding privilege of imposing punishment upon contemnors. So, notwithstanding that the determination of criminal guilt and the imposition of punishment are quintessentially and exclusively characteristic of the exercise of

³³ See, for example, *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 444; [1918] HCA 56; *Magaming v The Queen* [2013] HCA 40, [47], [61].

judicial power, the Commonwealth Parliament, and most other Australian Parliaments,³⁴ have the power to determine whether any person is guilty of contempt of the Parliament, and if so, to impose punishment. Professor Campbell attributes the development of the power of the English Parliament to punish for contempt to its desire for independence from the Crown, at a time when the judges of the Royal Courts held office at the pleasure of the monarch.³⁵

The jurisdiction of the courts to ensure that a power which might result in the loss of a person's rights or liberty is exercised in accordance with the principles of procedural fairness has been recognised for centuries. However, in accordance with the ethic of mutual respect to which I have referred, the courts have traditionally denied any capacity to review the exercise by a Parliament of the power to punish for contempt:

it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise.³⁶

So, if a person is committed to prison by a warrant issued by the Parliament and the warrant is on its face consistent with a breach of an acknowledged privilege of the House, the warrant is conclusive and

³⁴ Note 19, 191n 1.

³⁵ Note 19, 191-192.

³⁶ *R v Richards; Ex parte Fitzpatrick and Browne* [1955] HCA 36; (1955) 92 CLR 157, 162.

the court cannot look behind the warrant at either the merits of the adjudication or the procedure which was followed.³⁷

There has been at least one occasion upon which the respect shown by the courts to the exercise of Parliament's power to punish for contempt has not been reciprocated. In 1689 the House of Commons resolved that several judgments of the Court of King's Bench in cases involving the Serjeant at Arms of the House had violated the privileges of Parliament. Two former judges of the Court, Sir Francis Pemberton and Sir Thomas Jones were summoned to attend the House to explain why they had rejected the argument of the Serjeant at Arms to the effect that the Court had no jurisdiction to try the cases. After hearing the former judges, the House resolved that they had breached the privileges of the House and ordered that they be taken into custody until Parliament was prorogued. Pemberton and Jones each spent several months in Newgate Prison.³⁸

As Professor Campbell notes, this is not the only occasion upon which judges have been summoned before Parliament to account for their judgments.³⁹ In 1697, Lord Chief Justice Holt and another judge of the King's Bench, Eyre J, were summoned to appear before the House of Lords where they were questioned about one of their judgments. Further, in 1839, there was a body of opinion in the House of

³⁷ *R v Richards; Fitzpatrick and Browne* [7]; *The Case of the Sheriff of Middlesex* [1840] Eng R 360; 11 AD & E 273; 113 ER 419.

³⁸ Enid Campbell, 'Judges at the Bar of Parliament' (1999) 18 *Australian Bar Review* 131, 131.

³⁹ Note 38.

Commons to the effect that the judges of the Queen's Bench should be punished by the House for one of their judgments. However, after debate, it was resolved that punitive measures were not appropriate, and 1689 appears to have been the last occasion upon which a judge has been punished by a Parliament for contempt (which is just as well!).

Although the privilege of Parliament to punish contemnors is long established, the courts may exercise limited reviews of the exercise of those powers in certain circumstances. At the Commonwealth level, because particulars of the matters determined to constitute the contempt offence must, by virtue of s 9 of the *Parliamentary Privileges Act 1987* (Cth), be set out in the resolution imposing the penalty and the warrant committing the person, a court may review a decision to impose a penalty of imprisonment to determine whether the conduct or action in question was capable of constituting an offence.⁴⁰ If a warrant issued by any of the other Australian parliaments specifies the grounds of commitment, a court may determine whether it is sufficient at law to amount to a breach of privilege,⁴¹ but that is the extent of the courts' power of review.

⁴⁰ Namely, under s 4 of the *Parliamentary Privileges Act 1987* (Cth) that it 'amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member' (see *House of Representatives Practice* (6th edn) chapter 19.

⁴¹ *R v Richards; Fitzpatrick and Browne* [7].

Professor Campbell argues convincingly, to my mind at least, that it is time to seriously consider extending the courts' capacity to review the exercise of a Parliament's power to punish for contempt. She points to the practical inability of a Parliament to impose the same procedural safeguards and controls which protect persons facing charges in a court of law, and to the well-developed expertise of the courts in reviewing decisions of other tribunals to ensure compliance with the principles of procedural fairness. She also refers to Article 14 of the International Covenant on Civil and Political Rights, which provides that when charged with a criminal offence, 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law' and which further provides that 'everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal'.⁴²

3. The extent of the Parliament's power to control judicial officers and the extent of the court's jurisdiction over parliamentary officers

In the context of considering Parliament's power to adjudicate upon alleged contempts of the Parliament, I have already noted those historical occasions upon which a Parliament has used those powers to require judicial officers to explain their decisions.

Twelve years after Pemberton and Jones were imprisoned as a consequence of their judgment, the *Act of Settlement of 1701 (Imp)*

⁴² Note 19, 203-206.

removed the power of the monarch to dismiss judges at will.⁴³ Instead, judges' commissions were to stand so long as they were of good conduct (*quamdiu se bene gesserint*) and the monarch could only remove a judge from office following an address from both Houses of Parliament. The power has been exercised sparingly, and only one judge has been removed in Australia.⁴⁴

In Australia at least, care would have to be taken to ensure that the manner in which these parliamentary powers are exercised did not interfere with the independent performance of judicial functions. As all Australian courts are part of the system for the exercise of the judicial power of the Commonwealth contemplated by Chapter III of the Constitution, and as independence is an ineluctable characteristic of the judicial power,⁴⁵ any parliamentary interference with the independence of a judicial officer would very likely cross constitutional boundaries.

Professor Campbell refers to the interesting question of whether a judge can be required to attend before a parliamentary committee to give evidence relating to the performance of his or her judicial

⁴³ (*12 and 13 Will 3 c 2*) Article III, clause 7.

⁴⁴ In 1989 Justice Angelo Vasta of the Queensland Supreme Court was removed from office. A small number of judges were removed in colonial times before the modern constitutional provisions were fully in force. In more recent times, parliamentary procedures for removal have been initiated on a number of occasions and in a few instances removal has been debated in Parliament but not carried (Honourable John P Hamilton, 'Judicial Independence and Impartiality: Old Principles, New Developments' (13th South Pacific Judicial Conference Apia, Samoa, 28 June to 2 July 1999); Gareth Griffith, 'Removal of Judicial Officers: An Update' (NSW Parliamentary Library Research services e-brief, 9/2012, April 2012).

⁴⁵ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 [78]; [2006] HCA 44.

functions.⁴⁶ As she notes, at the Commonwealth level it can be argued that the separation of powers implicit in the Constitution of the Commonwealth prevents either House of Parliament from exercising the powers conferred by s 49 of the Constitution to interfere with the judicial powers of the Commonwealth, which are, by the Constitution, reserved to the courts created in accordance with Chapter III. On the other hand, as Professor Campbell notes, it might also be argued that such a limitation upon the investigatory power of the Houses of Parliament might not be consistent with the power of the Parliament to remove judges from office pursuant to s 72 of the Constitution.

It seems to me that the more likely reason for a cautious exercise of parliamentary powers with respect to judicial officers would be found in the ethic of mutual respect to which I have referred, rather than fear of constitutional transgression.

There are also occasions upon which the converse issue arises — namely, the issue of the extent to which the courts can interfere with the actions of members and officers of Parliament. Generally speaking, any action by a court which would impede a member or officer of a Parliament in the discharge of his or her duties would constitute a contempt of the Parliament. So, for example, a member of Parliament cannot be lawfully required to attend court at a time at which the Parliament is sitting, as any such requirement would prevent that member from attending to parliamentary duties.

⁴⁶ Note 38, 143-144.

Given the breadth of the privileges of Parliament, and the corresponding breadth of the constraint upon the powers of the court to take any action which could interfere with the workings of Parliament, it is perhaps surprising that on two recent occasions in Western Australia questions have arisen before me as to whether the court should take such an action. In *Re Parliamentary Inspector of the Corruption and Crime Commission; Ex parte Corruption and Crime Commission*,⁴⁷ the Corruption and Crime Commission of Western Australia sought an injunction, *ex parte*, to restrain the Parliamentary Inspector of the Commission from presenting a report to the Parliament. The relevant Act constituted the Inspector an officer of the Parliament, with responsibility for assisting a Standing Committee of the Parliament in the performance of its functions. Although it was not necessary, in the context of an urgent *ex parte* injunction, to form a concluded view on the question, I expressed a very serious doubt as to whether a claim of that kind was justiciable given that the relief sought would prevent an officer of the Parliament from discharging his duty to the Parliament. In the result, I refused the injunction on other grounds.

More recently, in *A v Corruption and Crime Commissioner*,⁴⁸ the Court of Appeal of Western Australia upheld a decision to dismiss a claim for an injunction to restrain the Corruption and Crime

⁴⁷ [2008] WASC 305.

⁴⁸ [2013] WASCA 288.

Commissioner from publishing video recordings of events which took place in the custodial area of a police station, and which had been tendered in evidence in a public hearing of the Commission. When I published the reasons of the Court of Appeal, counsel for the appellant sought orders which would have the effect of staying the decision, and preventing publication of the video recordings, until an application for special leave to appeal had been made to the High Court. Counsel for the Commission pointed out that such orders would be futile because later that day the Commission proposed to present its report to the Parliament, and the report included the video recordings, the subject of the proceedings before the Court. Counsel advised the Court that it was the invariable practice of the Parliament to immediately publish reports presented to it by the Commission unless a Presiding Officer made an order to the contrary. In that context, counsel for the appellant questioned whether the Court would entertain an application for an order restraining the Commission from presenting its report to the Parliament. I expressed the strong tentative view that such an order would be outside the jurisdiction of the Court and, if made, would very likely constitute a contempt of Parliament. In the result, no application for an order of that kind was made.

In summary, although questions do arise from time to time with respect to the capacity of the Parliament and the courts to interfere with the proceedings of the other, those occasions are rare. When such occasions do arise, the relevant entity generally proceeds with great

care to avoid any interference with the workings of the other, consistently with the ethic of mutual respect.

4. The interpretation and invalidation of legislation by the courts, and the Parliament's power to legislatively control the courts

As I have already noted, the essence of the judicial functions lies in the administration and enforcement of laws passed by the Parliament and of the common law of Australia. In order to perform that function, it is, of course, necessary for the courts to interpret and construe laws passed by the parliaments of Australia. It cannot be denied that this gives the courts the capacity to affect the operation and effect of the laws passed by those parliaments. However, consistently with the ethic of respect, it is well established that the primary obligation of a court construing a statute is to give effect to the intention of the Parliament to be ascertained from the words used by the Parliament in the statute.

In countries with a written constitution, the courts' jurisdiction to enforce the constitution includes the jurisdiction to determine whether a particular law falls within the scope of the legislative power conferred upon the enacting Parliament by the constitution. So in Australia and other countries with written constitutions, it is commonplace for courts invested with the relevant jurisdiction to determine whether laws passed by a Parliament are valid or invalid. Further, as I have noted, even in a country without a written

constitution, such as the United Kingdom, the incorporation of treaty obligations into the domestic law of the country can give rise to justiciable issues as to whether a particular law fails to comply with those obligations, in which event it is ineffective.

These powers stand in stark contrast to the observations made by Lord Coke in *Bonham's case* which were thought to contravene the supremacy of Parliament. However, the echoes of *Bonham's case* are clearly apparent in a relatively recent judgment of Lord Steyn, sitting in the House of Lords.⁴⁹ He observed:

... the European Convention on Human Rights as incorporated into our law by the Human Rights Act, 1998, created a new legal order. One must not assimilate the ECHR with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.⁵⁰

⁴⁹ *Jackson v The Attorney General* [2005] UKHL 56.

⁵⁰ *Jackson v The Attorney General* [102].

However, other members of the House of Lords in *Jackson's case* expressly affirmed the continuing validity of the doctrine of the supremacy of Parliament, and there has been no suggestion that the 'exceptional circumstances' to which Lord Steyn referred have arisen and justify the conclusion that a particular law exceeded the powers of the Parliament.

In addition to the constraints upon legislative power imposed under a written constitution, it is not uncommon for parliaments to legislate that a particular manner and form must be followed before legislation of a particular kind can be validly passed. Commonly those provisions take the form of a prohibition upon the presentation of a Bill for royal assent unless they have been passed by a specified parliamentary majority, or approved by a majority of electors voting at a referendum. When questions arise as to whether those provisions apply to a particular Bill, or whether their terms have been complied with, it now seems generally accepted that those questions can be determined by a court.

However, there have been differences of judicial opinion on the question of whether a court can or should intervene before the legislative process has run its full course. The cases on this question are conveniently collected by Professor Campbell in *Parliamentary Privilege*.⁵¹ In *Cormack v Cope*,⁵² members of the High Court

⁵¹ Note 19, 113-118.

⁵² (1974) 131 CLR 432; [1974] HCA 28.

expressed differing views on the question of whether the Court should entertain the issues prior to the legislative process having run its full course.

In *Marquet v Attorney-General (WA)*,⁵³ the Clerk of the Parliaments of Western Australia sought declarations as to whether it would be lawful for him to present two Bills for the Governor's assent, having regard to s 13 of the *Electoral Distribution Act 1947 (WA)* which relevantly provided that:

It shall not be lawful to present to the Governor for Her Majesty's assent any Bill to amend this Act, unless the second and third readings of such Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly respectively.

The proceedings were commenced before the Bills had been presented to the Governor. All parties and the six *amici curiae*⁵⁴ wanted an authoritative judicial ruling on the legal issues involved before the Bills were presented for royal assent. The Court, constituted by five judges, nevertheless gave express consideration to the extent of its jurisdiction, and concluded that the Court had jurisdiction to grant relief prior to presentation of the Bills for royal assent, and that it was appropriate for the Court to grant such relief and to declare that it would be unlawful for the Bills to be presented to the Governor.

⁵³ (2002) 26 WAR 21; [2002] WASCA 277.

⁵⁴ Who I represented.

When the case went on appeal to the High Court, all members of the Court other than Kirby J expressly reserved their position on the topic of justiciability, noting that no party or the *amici* contested the Court's jurisdiction.⁵⁵ Kirby J entertained 'no doubt' as to the justiciability of the proceedings and similarly had 'no doubt' that it was proper for the Full Court to exercise its power to decide the issues brought before the Court and to provide declaratory relief.⁵⁶

In summary, despite Lord Steyn's observation in *Jackson's case*, the courts have consistently adhered to the doctrine of the supremacy of Parliament for hundreds of years, consistently with fundamental concepts of democracy and the ethic of respect to which I have referred. The exercise of jurisdiction to determine whether a particular law is within the powers conferred upon the relevant legislature by a written constitution, or complies with manner in form provisions previously enacted by a legislature is not inconsistent with that ethic, but rather provides a mechanism for ensuring that the constitution and other laws of Parliament are respected and enforced.

However, when one comes to address the converse issue — namely, the extent to which parliaments should legislatively interfere with the independent functioning of the courts, some recent events raise a question as to the degree to which it could be said that parliaments

⁵⁵ *Attorney-General (WA) v Marquet* 217 CLR 545; [2003] HCA 67, [8].

⁵⁶ *Attorney-General (WA) v Marquet*, per Kirby J at [110].

respect the 'proper functions' of the courts, as espoused by Chief Justice French.

Although the essential role of the legislature is to enact laws, traditionally and consistently with the notion of independence of the courts, the courts have been empowered to promulgate subsidiary legislation in the form of court rules to control court procedure. About two years ago, after consulting widely with various people and organisations within the legal profession,⁵⁷ the judges of the Supreme Court of Western Australia resolved to simplify and modernise the procedure for applications for judicial review of administrative decisions, in line with changes made in other comparable Australian jurisdictions. Amended Rules of Court were promulgated by the judges.⁵⁸ They included a provision specifically relating to the power of the Court to order that a decision-maker whose decision was subject to review by the Court provide reasons for that decision.⁵⁹

There was nothing radical or novel about including such a provision within the amended rules. There is no doubt that the Court has always had power to order parties to legal proceedings to provide any information necessary to enable the Court to determine those proceedings. As Justice Heydon specifically observed in relation to a

⁵⁷ See for example, Wayne Martin, 'Judicial Review of Administrative Decisions in Western Australia – Procedural Reform' (Law Summer School 2012, University Club of WA, 24 February 2012).

⁵⁸ *Supreme Court Amendment Rules (2013)* (WA).

⁵⁹ Order 56, rule 2(5) as enacted by *Supreme Court Amendment Rules (2013)* (WA).

decision-maker being required to provide reasons for the purposes of court proceedings:

A decision-maker can be compelled to produce documents revealing the reasons for a given decision, whether by a subpoena duces tecum or a notice to produce. That decision-maker can be compelled by interrogatories to reveal those reasons in writing, and by a subpoena ad testificandum to reveal those reasons in the witness box.⁶⁰

The amended Western Australian rules adopted the same approach with respect to the provision of reasons for decisions which had been challenged in court as the New South Wales procedure promulgated by the Supreme Court of New South Wales some 13 years earlier.⁶¹

The Joint Standing Committee on Delegated Legislation expressed the tentative view that the Court had exceeded its powers and trespassed into the province of the Parliament by, in effect, requiring all decision-makers to provide reasons for their decisions. Each of Parliamentary Counsel and the Court rejected this view as the rules only applied to proceedings before the Court;⁶² as such it was merely an express enunciation of the Court's long-established power to order any party to proceedings before the Court to provide information where that information was necessary to enable the determination of the proceedings according to law. Nevertheless, the Committee chose

⁶⁰ *Minister for Home Affairs of the Commonwealth v Zentai* [2012] HCA 28, [95].

⁶¹ Supreme Court (NSW), Common Law Division – Administrative Law List Practice Note No 119 (2 May 2001); Supreme Court (NSW), Common Law Division – Administrative Law List Practice Note No 3 (16 July 2007) (current).

⁶² Joint Standing Committee on Delegated Legislation, *Report 66 – Supreme Court Amendment Rules 2013* (October 2013) (Appendix 3, 4).

to act upon contrary legal advice,⁶³ and recommended that the rules be disallowed.⁶⁴

It is of some significance that the Committee did not seek independent legal advice on the issue, but instead chose to rely upon advice provided by the executive government,⁶⁵ which, of course, had a vested interest in the subject matter of the rules, as the party most commonly defending applications for judicial review of administrative decisions. In its report, the Committee considered that it was more appropriate for the Parliament rather than the Court to determine the validity of the rules as this accorded with the 'principle that no-one should be a judge in their own cause'.⁶⁶ It was not apparent what weight the Committee gave to the fact that the Court was merely specifying procedures which would facilitate the just disposition of cases before the Court, with a view to providing fairness and justice to all parties.

The effect of the disallowance of the rules has been ameliorated to some extent. The rules were re-made without the provision which had attracted the ire of the Committee, and no objection was taken to that version of the rules,⁶⁷ and the Court can continue to rely upon its general case management powers to order the provision of reasons by

⁶³ Which I disagreed with in a detailed written review of that advice which was provided to the Committee for its consideration (Note 62, Appendix 3).

⁶⁴ Note 62.

⁶⁵ Which I disagreed with in a detailed written review of that advice which was provided to the Committee for its consideration (Note 62, Appendix 5).

⁶⁶ Note 62, 13.

⁶⁷ *Supreme Court Amendment Rules (No 3) 2013* (WA).

a decision-maker in an appropriate case. However, in my view this incident was a significant departure from the ethic of mutual respect between the parliamentary and judicial branches of government.

Another area of tension in the relationships between the Parliament and the courts arises from the increasing enthusiasm in a number of Australian jurisdictions for legislation which significantly restricts the discretion available to courts at the time of sentence,⁶⁸ usually by requiring that a particular mandatory minimum term of imprisonment be imposed. The obligation of a court to impose a sentence which is appropriate to the circumstances of the offence and the circumstances of the offender is a long-standing characteristic of the judicial function. The imposition of a mandatory minimum prison term limits the courts' capacity to perform that function. In effect, a mandatory minimum prison term can result in the Parliament determining the sentence which will be imposed, at least in those cases in which a court's sentence, having regard to the circumstances of the offence and of the offender, would have been less than the mandatory term prescribed by the Parliament.

Despite Parliament's curtailment of the discretion as to the punishment to impose, all seven members of the High Court held that statutory prescription of mandatory minimum term of imprisonment for serious crimes did not involve any usurpation of the judicial power which was

⁶⁸ Lenny Roth, *Mandatory Sentencing Laws* (NSW Parliamentary Library Research services e-brief, 1/2014, January 2014); Law Council of Australia, Policy Discussion Paper on Mandatory Sentencing (May 2014) Attachment A.

reposed by Chapter III of the Constitution exclusively in the courts.⁶⁹ This was even though the 'punishment of criminal guilt' has been described as 'exclusively judicial in character'.⁷⁰

It may be that in *Magaming*, the High Court has conceded that the constitutional restriction on parliamentary intervention in the sentencing process is set at a bare minimum: so long as a court imposes the sentence, Parliament can deprive it of any role in determining what that sentence should be.⁷¹ In my respectful view, this position can be characterised as judicial deference to the sovereignty of Parliament, rather than as an example of the ethic of mutual respect. The ethic of mutual respect would result in greater parliamentary restraint in the exercise of the legislative power to restrict judicial discretion by requiring courts to impose mandatory minimum sentences.

Conclusion

This analysis of four areas of intersection between the governmental functions exercised by the Parliament and the courts suggests that, while there may on occasion be departures from the ethic of mutual

⁶⁹ *Magaming v The Queen*. The other member of the Court, Gageler J, did not consider that a law which imposed a mandatory minimum sentence upon all offenders convicted of a particular offence would contravene any constitutional principle. However, in his minority view, a law which empowered an official (the Director of Public Prosecutions) to decide whether to charge some members of a class of offenders with an offence which did not have a mandatory minimum penalty, and to charge other offenders within that same class with an offence which did carry a mandatory penalty impermissibly transferred power with respect to the imposition of sentence from the judiciary to the executive.

⁷⁰ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27; [1992] HCA 64.

⁷¹ *Magaming v The Queen* [27].

respect, in the main it continues to have a significant bearing upon the actions of each branch of government. However, greater parliamentary intervention in the exercise of the courts' discretion to impose a sentence appropriate to the circumstances of the offence and of the offender is concerning for a number of reasons,⁷² and may prove to be a contemporary tendency towards the erosion of this ethic.

⁷² See, for example, Hon Justice Stephen Rothman AM, 'Equal Justice, Mandatory Sentencing and the Rule of Law' (Keynote Address, Legal Aid Commission Conference, 2 July 2014); Desmond Manderson and Naomi Sharp, 'Mandatory Sentences and the Constitution: Discretion, Responsibility, and Judicial Process' (2000) 22 *Sydney Law Review* 585; Nicholas Cowdrey AM QC 'Mandatory sentencing' (Sydney Law School, Distinguished Speakers Program, 15 May 2014); Lenny Roth, *Mandatory Sentencing Laws* (NSW Parliamentary Research Service e-brief 1/2014, January 2014).